

RELIGIOUS PERSECUTION AND CONSTITUTION BUILDING IN THE MIDDLE EAST: THE RULE-OF-LAW CONUNDRUM

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INTRODUCTION

The status of religious freedom in the Middle East is almost unequivocally saddening. The 2021 *United States Commission on International Religious Freedom (USCIRF)*'s *Annual Report* recommended designating eight countries of the region as “either a Country of Particular Concern . . . or Special Watch List.”¹ Countries in which governments tolerate or engage in “severe” violations of religious freedom deserve the Special Watch List; those in which such violations are “particularly severe” become of Particular Concern.² The Special Watch List now comprises Afghanistan³—but the list was released before the return of the Taliban—Egypt, Iraq, and Turkey; Particular Concern Countries are Iran, Saudi Arabia, and Syria.⁴ The only positive signs are spotted in Bahrain.⁵

If for religious freedom's protection the general outlook is quite dark, the scenario looks authentically terrifying for some minorities who inhabit that region of the world. Particularly worrisome is the situation of Christianity, which seems to be “the most vulnerable of

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1 Jeremy P. Barker, Miles Windsor, Salah Ali, Daniel Harre & Brynn Keel, *The Middle East and North Africa in the 2021 USCIRF Annual Report*, CORNERSTONE F., May 8, 2021, at 1.

2 *Id.* at 2.

3 Afghanistan is not considered part of the Middle East from a geographical point of view; because of political, ethnic, and religious factors it is however often included in the list. See *Middle East*, ENCYC. BRITANNICA, <https://www.britannica.com/place/Middle-East> [<https://perma.cc/9PXD-7Q8V>].

4 Barker et al., *supra* note 1, at 4–5.

5 *Id.* at 1.

religious groups in the Middle East.”⁶ Although this faith was born in the Middle East, it is on the brink of vanishing from it.

Christians used to be 20% of the total population in the Middle East; now they are 5% of it.⁷ After experiencing ethnic cleansing,⁸ Iraq’s Christians are “close to extinction.”⁹ In 2003, when the U.S.-led coalition invaded Iraq, the Christian community was composed of some 1,500,000 members; now it has dwindled by 83% and comprises only 250,000 individuals.¹⁰ Among Palestinians, Christians have decreased by 87%¹¹ in a few decades and are now below 1.5% of the population.¹² In Syria, Christians have declined “from 1.7 million in 2011 to below 450,000;”¹³ the historical city of Aleppo used to have 360,000 Christian residents, but now the figure is down to 25,000.¹⁴ And where Christians are not wiped away they still suffer grave threats, such as the “bombing of churches” in Egypt.¹⁵

Numerous factors have certainly triggered persecutions and contributed to the decline and the displacement of minorities in the region. The most noticeable factor probably was the Islamic State (“ISIS”) and its systematic policy of ethnic cleansing.¹⁶ ISIS slaughtered the Yazidis,¹⁷ but also forced other religious minorities to leave. Although ISIS theoretically reintroduced the payment of the *jizya*—a sum that, according to Islamic law, religious minorities should pay to the Islamic ruler as a *quid pro quo* for their protection¹⁸—it did not really stop committing violence against them.¹⁹

6 PHILIP MOUNSTEPHEN, BISHOP OF TRURO’S INDEPENDENT REVIEW FOR THE FOREIGN SECRETARY OF FCO SUPPORT FOR PERSECUTED CHRISTIANS: FINAL REPORT AND RECOMMENDATIONS 26 (2019).

7 Joe Carter, *5 Facts About Persecution of Christians in the Middle East and North Africa*, ETHICS & RELIGIOUS LIBERTY COMM’N (May 31, 2019), <https://erlc.com/resource-library/articles/5-facts-about-persecution-of-christians-in-the-middle-east-and-north-africa/> [<https://perma.cc/433E-3H7U>].

8 MOUNSTEPHEN, *supra* note 6, at 17.

9 Frank Gardner, *Iraq’s Christians ‘Close to Extinction’*, BBC (May 23, 2019), <https://www.bbc.com/news/world-middle-east-48333923> [<https://perma.cc/VN4D-KCF9>].

10 *Id.*

11 Carter, *supra* note 7.

12 MOUNSTEPHEN, *supra* note 6, at 17.

13 Carter, *supra* note 7.

14 MOUNSTEPHEN, *supra* note 6, at 26.

15 *Id.* at 18.

16 See Erica C. D. Hunter, *Persecution of Christians by ISIS Contradicts Idea of a Caliphate*, THE CONVERSATION (July 28, 2014), <https://theconversation.com/persecution-of-christians-by-isis-contradicts-idea-of-a-caliphate-29710> [<https://perma.cc/5MZH-ZNGB>].

17 See HUMA HAIDER, THE PERSECUTION OF CHRISTIANS IN THE MIDDLE EAST 11 (2017).

18 EMILE TYAN, INSTITUTIONS DU DROIT PUBLIC MUSULMAN 109 (1999).

19 HAIDER, *supra* note 17, at 12.

Besides casting clouds on religious freedom's outlook, the situation of religious freedom and persecution in the Middle East provides an opportunity to reflect upon international—and especially Western—interventions in the region. In fact, there is evidence that the political, military, cultural, and legal efforts that international organizations, national governments, and academics put into toppling the regional rulers may have failed to help protect primary goods such as religious freedom and enforce the rule of law more broadly, if they have not undermined them.

While the dramatic evacuation from Afghanistan was drawing to an end, the twenty years of commitment had hardly changed the stark reality on the ground: “[T]he persecution imposed [on Christians] during the era of Taliban rule beginning in the 1990s never stopped.”²⁰ In fact, “[t]he Taliban’s ouster in 2001 did little to change societal norms.”²¹ Other international interventions aimed at instilling a legal culture that would protect religious freedom were not just ineffective; sometimes regime changes worsened the conditions of the minorities. In Syria, Christians now are said to “be breathing a small sigh of relief” because President Bashar Assad regained control of much of the territory.²² The starting point against which the exodus of Iraqi Christians is measured is 2003, when Saddam Hussein’s regime came to an end.²³ And ISIS cannot be blamed for all the religious freedom violations that followed: a 2019 report noted that “Daesh may have gone, but many of the Iranian-backed Shia Muslim militias . . . who assisted with the liberation and now play a role in ensuring security have been accused of various offences” against Christians.²⁴ To put it in broader terms, as the Anglican Bishop of Truro emphasised in his thorough report on anti-Christian persecution around the world, “[t]he 2011 ‘Arab Spring’ and the fall of old dictatorships gave ground to religious extremism that increased greatly the pressures upon and persecutions of Christians in Egypt, Syria, Iraq and Libya.”²⁵ All in all, it is generally believed that “[a]s dictators in the Middle East were toppled, their longstanding protection of minorities also ended.”²⁶

This picture questions not just the results of years of financial, political, and military international and especially Western commitment. It questions their goals: namely, the—either implicit or

20 Eric Patterson, *How Did We Get Here? Religious Freedom Never Took Off in Afghanistan*, CORNERSTONE F., Aug. 27, 2021, at 1.

21 *Id.*

22 Gardner, *supra* note 9.

23 See *Iraq War*, ENCYC. BRITANNICA, <https://www.britannica.com/event/Iraq-War> [<https://perma.cc/3VGW-JMR2>].

24 MOUNSTEPHEN, *supra* note 6, at 58–59.

25 *Id.* at 22.

26 HAIDER, *supra* note 17, at 4.

explicit—association between democratization, the rule of law, and human rights on the one side, and the end of religious persecution and intolerance on the other.

The idea that the rule of law and other core values of constitutionalism are the recipe for the Middle East has pervaded the narrative of rights of the latest decades. It is probably President George Bush Sr. who made the most explicit statement on the topic. While addressing the Senate to explain why the U.S. military would intervene in the Iraq-Kuwait struggle in 1990, he said:

And today that new world is struggling to be born. A world quite different from the one we've known. A world where the rule of law supplants the rule of the jungle. A world in which nations recognize the shared responsibility for freedom and justice. A world where the strong respect the rights of the weak.²⁷

President Bush Sr.'s faith in the rule of law was indisputable, as is that of many who have been supportive of regime changes. Their high expectations stem from the belief in "a free society,"²⁸ namely a polity governed by a sound constitutional framework that contemplates "enumerated rights," "the separation of powers," and, more fundamentally, "the rule of law."²⁹

The sad picture of the Middle East seems to tell a different story: a story that this short Essay aims to sketch out. Its overarching thesis is that, by promoting the rule of law and constitutionalism as they understand it, Westerners may not have always done a good job for minorities and in fighting religious persecution. This story is particularly relevant especially in light of the continued concern for religious persecution in the Middle East, as it can provide a compass for present and future strategies in the region. Even if Western democracies cannot anticipate and control the spread of violence perpetrated by groups such as ISIS, they certainly can take care of their own initiatives. This Essay also indirectly explains the paradoxical strategy of religious minorities who, despite populating the lower social and legal ranks of their countries, feel more secure with tyrants, authoritarian regimes, or discriminatory policies, rather than with regime changes and liberal constitutionalism, as the Syrian Christians attested when they felt more secure with the autocratic President Assad back in charge.

27 *Transcript of President's Address to Joint Session of Congress*, N.Y. TIMES, Sept. 12, 1990, at A20.

28 See, e.g., David R. Stras, *What My Grandparents' Experiences in the Holocaust Taught Me About the First Amendment*, 15 N.Y.U. J.L. & LIBERTY (forthcoming 2022) (manuscript at 710), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3935340 [<https://perma.cc/2DGB-4597>].

29 *Id.* at 720.

Given the strong Western involvement in Afghanistan and Iraq, this Essay compares the concept of the rule of law and its ramifications with the social and political outlook of these two countries. In Afghanistan and Iraq the Western promotion of regime changes and of constitution building was strong. Despite the repeated international efforts, which have translated into formal constitutional texts with largely Western input, Afghanistan was “disastrously” lost to the Taliban,³⁰ and Iraq became a society fractured along sectarian lines, with Iran discharging the role of kingmaker.³¹ Syria will not be a focus of this piece of scholarship. This country is in no better shape, of course: it first changed its constitution in 2012,³² underwent another constitution drafting in 2017 under Russian auspices,³³ and is now being pushed by the United Nations to undergo another drafting process.³⁴ But Syria has seen Western allies taking the back seat, with the main international players being Russia, Turkey, and Iran.³⁵

A lot of scholarship and commentary has focused on the details that surrounded the international interventions. The main critiques have targeted the specifics of the American-led regime change in Iraq³⁶ or, more recently, of the United States’ withdrawal from Afghanistan.³⁷ This Essay does not question how post-revolts and regime-toppling processes specifically developed in the Middle East. Nor does it tackle or endorse the controversial opinion that sees some people as simply not fit for democracy,³⁸ or the belief that some states are mere artificial entities.³⁹ Finally, it does not take shortcuts and blame Islam for the widespread persecutions, although of course Islam is the biggest religious player in the area, and research has shown that “Muslim-

30 GILLES KEPÉL, *IL RITORNO DEL PROFETA: PERSCHÉ IL DESTINO DELL'OCCIDENTE SI DECIDE IN MEDIO ORIENTE* 16 (2021).

31 *See id.* at 64–65.

32 *See Constitutional History of Syria*, CONSTITUTIONNET, <https://constitutionnet.org/country/syria> [https://perma.cc/4J2K-BTMK].

33 *See Syrian Arab Republic 2017—Draft of 23 Jan 2017*, CONSTITUTE, https://www.constituteproject.org/constitution/Syria_2017D?lang=en [https://perma.cc/S3ZW-M572].

34 *See Talks to Draft Syria's Constitution to Resume on October 18*, AL JAZEERA (Sept. 28, 2021), <https://www.aljazeera.com/news/2021/9/28/syria-constitution-talks-to-resume-october-18-in-geneva-un> [https://perma.cc/64XZ-8FDE].

35 KEPÉL, *supra* note 30, at 16–17.

36 *See, e.g.*, ANDREW ARATO, *CONSTITUTION MAKING UNDER OCCUPATION: THE POLITICS OF IMPOSED REVOLUTION IN IRAQ*, at vii–viii (2009).

37 *See, e.g.*, Bret Stephens, *Opinion, America's Crumbling Global Position*, N.Y. TIMES (Oct. 26, 2021), <https://www.nytimes.com/2021/10/26/opinion/us-military-russia-china-iran.html?searchResultPosition=2> [https://perma.cc/J4EM-FN8Y].

38 Asem Khalil, *From Constitutions to Constitutionalism: An Opportunity for Arab States, Not a Paradox*, 6 CLPE RSCH. PAPER SERIES, no. 2, 2010, at 4.

39 *Id.* at 6 (noting that “contemporary Arab states are . . . largely artificially shaped”).

majority countries have high[] levels of religious persecution and conflict.”⁴⁰

This Essay shows that the dynamics that incite violence and persecutions in the area cannot simply be traced back to Islam, but to the sectarian logic of those that often run the newly born democratic institutions. In fact, the Essay emphasizes how expectations may differ between those who believe that democracy, constitutionalism, and especially the rule of law are always beneficial for religious freedom on one side, and the people who are expected to benefit from such goods on the other side.

This Essay mainly focuses on the rule of law as a key concept to understand the distance between the expectations and the stark reality of the Afghani and Iraqi constitutional experiments. It first contrasts the expectations entrenched in the Afghani and Iraqi Constitutions with their poor rule-of-law performances. Then it zooms in on their articles enforcing the rule of law and protecting the individual. Third, it focuses on the individualist premises of the rule-of-law theory. Fourth, it parses out how the two countries’ newborn institutions actually functioned. Fifth, it explains why the two regimes did not secure freedom and the rule of law in light of the role of the individual in Middle Eastern political culture. It finally suggests that the consociational system is a model of government that is known to the West and that would most likely work within the Middle East.

I. AFGHANISTAN AND IRAQ: WESTERN SANDBOXES IN THE MIDDLE EAST

Every year, the *World Justice Project* compiles a *Rule of Law Index* on the basis of eight factors: “Constraints on Government Powers”; “Absence of Corruption”; “Open Government”; “Fundamental Rights”; “Order and Security”; “Regulatory Enforcement”; “Civil Justice”; and “Criminal Justice.”⁴¹ Venezuela occupies the bottom placement in the 2021 edition of the *Index* with number 139. Afghanistan is at number 134, while Iraq does not even show up on the list.⁴²

Both in Afghanistan and Iraq, international coalitions were able to import a constitutional culture and a variety of legal ideals that were entrenched in constitutional texts. Such texts were supposed to shield individuals and groups from violence and abuse through a series of mechanisms that included the rule of law, fundamental rights, separation of powers, and so on.

40 BRIAN J. GRIM & ROGER FINKE, *THE PRICE OF FREEDOM DENIED: RELIGIOUS PERSECUTION AND CONFLICT IN THE TWENTY-FIRST CENTURY* 161 (2011).

41 WORLD JUSTICE PROJECT, *RULE OF LAW INDEX 2021*, at 15 (2021).

42 *Id.* at 10–11.

The idea of charting a new course, based on the core values of constitutionalism, is on full display in the Constitution of Afghanistan that entered into force in 2004:

The state shall be obligated to create a prosperous and progressive society based on social justice, preservation of human dignity, protection of human rights, realization of democracy, attainment of national unity as well as equality between all peoples and tribes and balance development of all areas of the country.⁴³

Similarly, but perhaps less daringly, the 2005 Iraqi Constitution states that “[t]he Republic of Iraq is a single federal, independent and fully sovereign state in which the system of government is republican, representative, parliamentary, and democratic, and this Constitution is a guarantor of the unity of Iraq.”⁴⁴

The Afghani Constitution also states that national legislation cannot contravene Sharia,⁴⁵ and the Iraqi Constitution contains a similar provision.⁴⁶ Such clauses obviously raised several eyebrows. But these two provisions cannot be considered the only factors that hijacked the two constitutional trajectories and drove the two strained countries into anarchy, with the Taliban seizing power again in Afghanistan. Taken in isolation, those two provisions cannot explain the two countries’ poor scores in the *Rule of Law Index*.⁴⁷

Unfortunately, if this Essay’s thesis is correct, the attempts to enforce a sound rule-of-law culture may have not just failed. They may have even worsened the situation on the ground, with a perverse effect on the treatment of religious minorities. In order to understand why such a paradox occurred, one needs to take a look back at what the rule of law entails: a treasure trove of constitutional principles that the Western world would hardly give away, but which seem difficult to square with the fabric of Middle Eastern political societies.

II. THE RULE OF LAW IN THE CONSTITUTIONAL TEXTS OF AFGHANISTAN AND IRAQ

Although it is still a matter of endless debate, it is safe to say that foreseeability, equality before the law, and a system of courts that

⁴³ AFG. CONST. 2004 art. 6.

⁴⁴ Article 1, Dustūr Jumh. ūriyat al-‘Irāq [The Constitution of the Republic of Iraq] of 2005.

⁴⁵ AFG. CONST. 2004, art. 3 (“No law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan.”).

⁴⁶ Article 2, Section 1, Dustūr Jumh. ūriyat al-‘Irāq of 2005 (“No law may be enacted that contradicts the established provisions of Islam.”).

⁴⁷ See Clark B. Lombardi, *Designing Islamic Constitutions: Past Trends and Options for a Democratic Future*, 11 INT’L J. CONST. L. 615, 616 (2013) (emphasizing that constitutional provisions granting Islamic law and principles a special status should not be overestimated).

adjudicate disputes on the basis of either legislation or precedent certainly are at the heart of the rule of law, as they were the core ideas around which A.V. Dicey developed the concept.⁴⁸ Despite considerable variations, the contemporary understandings of this concept, such as Lord Tom Bingham of Cornhill's,⁴⁹ have expanded the concept but have still been in keeping with Dicey's reading. Bingham himself summarized the core aspects of the concept as the belief that "all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts."⁵⁰ This idea of the rule of law, together with its cognate ideas of democracy and fundamental rights, has populated the concept of a rule-of-law constitutional state.⁵¹ The processes in Afghanistan and Iraq that culminated in brand new constitutional texts promoted the incorporation of such concepts.

As Lord Bingham's phrasing cited above showcases, within the type of constitutionalism that is centered around the idea of the rule of law, individuals occupy a central place.⁵² This emphasis on the individual places everyone in the same jurisdiction on the same footing in terms of rights, duties, and judicial protection. After all, this is an aspect of the rule of law that can be easily traced back to Dicey himself, who stated that:

[W]hen we speak of the "rule of law" as a characteristic of our country, [we mean] not only that with us no man is above the law, but . . . that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.⁵³

The Constitutions of Afghanistan and Iraq scrutinized here echo this approach quite clearly. The Afghan Constitution states that "[a]ny kind of discrimination and distinction between citizens of Afghanistan shall be forbidden. The citizens of Afghanistan, man and woman, have

48 See A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 106–115 (LibertyClassics 1982) (1885).

49 His definitive contribution to the subject is TOM BINGHAM, *THE RULE OF LAW* (2010).

50 *Id.* at 8.

51 Luigi Ferrajoli, *The Normative Paradigm of Constitutional Democracy*, 17 *RES PUBLICA* 355, 356, 360 (2011).

52 Legal theory and legal philosophy have long debated the correct understanding of the individual, and many scholars prefer using the word "person" rather than "individual" in order to convey a more social and less self-referential conception of the human being. This Essay, however, does not aim to espouse or reject any specific theory, but only to emphasize the central role and importance given to the human being, considered in itself, vis-à-vis social groups of any kind.

53 DICEY, *supra* note 48, at 114.

equal rights and duties before the law.”⁵⁴ Equality in the Afghan Constitution also explicitly controls the political process: “The citizens of Afghanistan shall have the right to elect and be elected. The conditions of exercising this right shall be regulated by law.”⁵⁵ The Iraqi Constitution similarly states very clearly that “Iraqis are equal before the law without discrimination based on gender, race, ethnicity, nationality, origin, color, religion, sect, belief or opinion, or economic or social status.”⁵⁶ And it proclaims that “[e]very individual has the right to enjoy life, security and liberty. Deprivation or restriction of these rights is prohibited except in accordance with the law and based on a decision issued by a competent judicial authority.”⁵⁷ Finally, both the Afghan and the Iraqi constitutions enshrine religious freedom among the core liberties that they accord to their citizens, echoing contemporary constitutionalism’s characteristic concern for this freedom.⁵⁸

The quite volatile conditions that Iraq is facing and the sad turnout of the Afghan political arc seem to suggest that their constitutional texts have hardly had any connection with the reality on the ground. But, if one looks at how both regimes have functioned for long periods of time, it seems that replacing the two autocratic regimes with new rule-of-law inspired constitutional values and mechanisms may have been ineffective or even triggered perverse reactions.

III. THE INDIVIDUAL, THE STATE, AND THE ROLE OF POLITICAL INSTITUTIONS ACCORDING TO THE RULE OF LAW

The constitutional structures envisioned in the Afghan and Iraqi constitutions reflect the typically Western idea, once noted by the great German scholar Jürgen Habermas, that states are inhabited by individuals who enjoy “equal freedom of religion under the proviso that they no longer barricade themselves within their religious communities and seal themselves off from one another.”⁵⁹ This proviso translates into the constitutional requirement that “[a]ll subcultures, whether religious or not, are expected to free their individual members from their embrace so that these citizens can *mutually recognize* one another in civil society as members of *one and the*

54 AFG. CONST. 2004, art. 22.

55 *Id.* art. 33.

56 Article 14, Dustūr Jumh. ūriyat al-‘Irāq [The Constitution of the Republic of Iraq] of 2005.

57 *Id.* art. 15.

58 See AFG. CONST. 2004, art. 2; Article 2, Dustūr Jumh. ūriyat al-‘Irāq [The Constitution of the Republic of Iraq] of 2005.

59 Jürgen Habermas, *Notes on a Post-Secular Society*, NEW PERSPS. Q., Fall 2008, at 17, 22.

same political community.”⁶⁰ This requirement is a necessary precondition for a full and equal citizenship and ensures that “the fate of religious minorities no longer depends on the benevolence of a more or less tolerant state authority.”⁶¹

Making religion, ethnicity, or other forms of affiliation politically and legally irrelevant and requiring that the society functions as a group of individuals who engage in relationships might be not just correct, but even indispensable within a rule-of-law constitutional framework. As the Oxford constitutional law professor Nick Barber has noted, equality in rule-of-law-based societies is dominated by an individualistic approach.⁶² Civil society itself is “a community in which interactions are peaceful and in which people trust others to observe legally established constraints.”⁶³ Political institutions, and mostly legislatures, transform the diversity among citizens into a collaborative task, which should “reduce the risk of ‘groupthink’ that can arise amongst those of a shared background. Groupthink arises where a group closes in on itself; its members push each other towards consensus, shutting out dissent”⁶⁴ In rule-of-law democracies, elected bodies “help[] bring people together behind a decision even if they continue to disagree with it.”⁶⁵

Within this framework, statehood is comprised of individuals who mutually recognize each other as peers. Deviations from equality are accepted only insofar as they pursue inclusion and avoid the marginalization of minority groups.⁶⁶ Groups, in fact, are protected because and as long as they are numerically inferior, in order to avoid that “the bulk of the society merely stands by and lets the government or majority groups trample on the rights of minorities in a way that undermines equality or equity considerations”⁶⁷

Trying to enforce such principles and rules in Afghanistan and Iraq has proven incredibly difficult, and has often ended in ethnic cleansing, sectarian bloodshed, and religious persecution. A deeper look at how such societies traditionally function helps one understand why.

60 *Id.* at 22–23.

61 *Id.* at 23.

62 See N.W. BARBER, *THE CONSTITUTIONAL STATE* 53 (2010).

63 N.W. BARBER, *THE PRINCIPLES OF CONSTITUTIONALISM* 136 (2018).

64 *Id.* at 162 (footnote omitted).

65 *Id.* at 163.

66 See TARUNABH KHAITAN, *A THEORY OF DISCRIMINATION LAW* 51 (2015) (discussing how discrimination law in democratic societies treats advantaged groups differently from disadvantaged groups).

67 Larry May, *Bystanders, The Rule of Law, and Criminal Trials*, in *GETTING TO THE RULE OF LAW* 241, 261 (James E. Fleming ed., 2011).

IV. THE RULE OF LAW ON THE GROUND IN AFGHANISTAN AND IRAQ

Afghanistan slowly surfaced as a unified territory in the eighteenth century.⁶⁸ The British and the Russian Empire fought over and around it for most of the nineteenth century.⁶⁹ The twentieth century did not bring real peace or stability for the country, however.

The country has been governed by eight distinct constitutional texts between 1923 and 2004, with Soviets and Americans alternatively playing the pivotal role in influencing their drafting.⁷⁰ The Afghan constitutional texts of 1923, 1931, 1964, 1977, 1980, 1987, 1990, and 2004 did not dramatically change the reality on the ground, however.⁷¹ Although Islamic law does not contemplate customs as a source of law,⁷² the Afghan territory has long been governed by an amalgamation of local customs and Islamic law.⁷³ Political institutions have combined tribal and ancestral foundations by mixing Islamic sources with local practices, as the only viable solution for a vast territory that comprises several ethnic, linguistic, and religious groups.⁷⁴

The reality on the ground is therefore made up of leaders who exploit ethnic and religious affiliations, control portions of the territory, and mutually negotiate the public agenda. Unfortunately, the 2004 Constitution does not reflect this reality. Although it cites the importance of the tribes among its opening articles,⁷⁵ this text does not acknowledge the political relevance of tribes or clans and the quasi-judicial role that tribal groups have constantly discharged.⁷⁶ It even seems to boycott the mechanisms that make sociality feasible, as it prohibits the creation of tribal parties.⁷⁷

By trying to liberate Afghans from their ancestral institutions, the 2004 Constitution thus fought their social and political fabric instead of integrating it. Western supporters of a free Afghanistan had already misunderstood the national political culture after the Soviet Army left

68 Nadjma Yassari & Mohammad Hamid Saboor, *Sharia and National Law in Afghanistan*, in SHARIA INCORPORATED: A COMPARATIVE OVERVIEW OF THE LEGAL SYSTEMS OF TWELVE MUSLIM COUNTRIES IN PAST AND PRESENT 273, 275 (Jan Michiel Otto ed., 2010).

69 See *id.*; FAIZ AHMED, AFGHANISTAN RISING: ISLAMIC LAW AND STATECRAFT BETWEEN THE OTTOMAN AND BRITISH EMPIRES 6 (2017).

70 ANDREA PIN, *IL RULE OF LAW COME PROBLEMA* 150 (2021).

71 *Id.* & n.72.

72 *Id.* at 150.

73 See Yassari & Saboor, *supra* note 68, at 273, 279.

74 See *id.* at 273–75, 279; PIN, *supra* note 70, at 150–51.

75 See AFG. CONST. 2004, arts. 4, 6.

76 See *id.*; MASSIMO PAPA, AFGHANISTAN: TRADIZIONE GIURIDICA E RICOSTRUZIONE DELL'ORDINAMENTO TRA SARIA, CONSUETUDINI E DIRITTO STATALE 314–16 (2006).

77 See AFG. CONST. 2004, art. 35 (“Formation and operation of a party on the basis of tribalism, parochialism, language, as well as religious sectarianism shall not be permitted.”).

the country in the 1990s,⁷⁸ and made the same mistake again during the post-2001 constitutional process.⁷⁹ On the contrary, the Taliban seized control of the country not just after the Soviets left, but also much more recently, precisely because they were able to infiltrate the society.⁸⁰

It was only in 2020 that the U.S. really came to terms with reality and decided to negotiate with the Taliban.⁸¹ The Doha accords did seem to concede that the Taliban had social grip and needed to be dealt with. Understanding the Taliban as a social force, somehow rooted within the civil society, challenged the basic premises not just of the military intervention, but even of the very rule-of-law standards. It was certainly not easy to square commitment to the rule of law with a religious movement that aims to rule according to Islamic law rather than democracy, does not believe in equality, and treats people according to their faith rather than as individuals.

The constitutional trajectory of Iraq has suffered from the same disease, although in different forms. Iraq is a very young nation which came into existence thanks to the international coalition that ruled the Middle East after the demise of the Ottoman Empire.⁸² The state was a vassal of the British Empire until it became a republic in 1958.⁸³ Saddam Hussein was able to seize control of the country over the 1960s and then govern it with his iron fist.⁸⁴ Under Saddam's control, "[Iraq] was a dictatorial mockery of the rule of law," wherein "citizens ha[d] no recourse to due process" against political brutality.⁸⁵ Despite formally embracing his Ba'ath Party's socialist ideals,⁸⁶ Saddam and his army developed a narrative along ethno-sectarian lines⁸⁷ and isolated

78 See Yassari & Saboori, *supra* note 68, at 289–90.

79 PIN, *supra* note 70, at 154.

80 See *id.*; CONOR KEANE, US NATION-BUILDING IN AFGHANISTAN 33 (2016).

81 See Agreement for Bringing Peace to Afghanistan Between the Islamic Emirate of Afghanistan Which is Not Recognized by the United States as a State and is Known as the Taliban and the United States of America, Afg.-U.S., Feb. 29, 2020, U.S. Dep't of State, <https://www.state.gov/wp-content/uploads/2020/02/Agreement-For-Bringing-Peace-to-Afghanistan-02.29.20.pdf> [<https://perma.cc/3PZ5-YRJJ>].

82 See CONSTANCE A. JOHNSON, L. LIBR. OF CONG., IRAQ: LEGAL HISTORY & TRADITIONS 11 (2004).

83 See *id.* at 12, 21.

84 See *id.* at 29.

85 Richard W. Miller, *Might Still Distorts Right: Perils of the Rule of Law Project*, in 50 NOMOS: GETTING TO THE RULE OF LAW 265, 269 (James E. Fleming ed., 2011).

86 Kamyar Abdi, *From Pan-Arabism to Saddam Hussein's Cult of Personality: Ancient Mesopotamia and Iraqi National Ideology*, 8 J. SOC. ARCHEOLOGY 3, 13 (2008).

87 Ahmed Hashim, *Saddam Husayn and Civil-Military Relations in Iraq: The Quest for Legitimacy and Power*, 57 MIDDLE E. J. 9, 40 (2003) (stating that "the national element is circumscribed by its being a narrowly-based ethno-sectarian one").

the Shia majority,⁸⁸ which has some of its holiest places in the Iraqi territory.⁸⁹ Hussein and his military comrades did not want to share power with the Kurdish minority, which was predominantly Sunni but craved the establishment of an independent Kurdistan. Christians enjoyed some protection as they did not challenge Saddam,⁹⁰ could not compete demographically with Shia,⁹¹ and could not aspire to territorial independence the way Kurds did because of their overwhelming presence in the northern part of the country.⁹²

The coalition that ousted Saddam Hussein set out to develop a sound constitutional framework. As seen above, the 2004 constitutional text foresaw the birth of democratic institutions, within which individuals would vote according to their opinions and the elected bodies would negotiate in pursuance of the public interest. The reality was very distant from this picture, however. The demographically predominant Shia exploited the democratic mechanisms to rule the country according to their political agenda—an agenda that vacillated between the interests of neighboring Iran, which they revere as a functional and modern fully fledged Islamic-Shia state, and local Shia intellectuals.⁹³ Kurds traded their independence claims for a decentralized state that would secure great levels of autonomy and the exploitation of the rich oil plants of the Kurdish region.⁹⁴

Sunnis did not simply lose power. The constitution banned the Ba’ath Party that Saddam Hussein once led.⁹⁵ Moreover, in trying to

88 See Alessia Melcangi & Riccardo Redaelli, *The Re-Sectarization of the Middle East: Minorities, Communities and Identity Politics within the Current Geopolitical Confrontation*, in PROTECTION OF CULTURAL AND RELIGIOUS MINORITIES 117, 126 (Ida Caracciolo & Umberto Montuoro eds., 2019).

89 See *id.*; SAMUEL HELFONT, COMPULSION IN RELIGION: SADDAM HUSSEIN, ISLAM, AND THE ROOTS OF INSURGENCIES IN IRAQ 36–51 (2018). See also Augustus Richard Norton, *Al-Najaf: Its Resurgence as a Religious and University Center*, 18 MIDDLE E. POL’Y 132, 132 (2011) (stating that the Iraqi city of Najaf “is a storied city in the history of Shia Islam”).

90 Anthony O’Mahony, *Christianity in Modern Iraq*, 4 INT’L J. STUDY CHRISTIAN CHURCH 121, 128–29 (2004).

91 *Id.* at 123 (stating that Christians numbered around 3–5% of the total population).

92 *Id.* at 132.

93 See KEPEL, *supra* note 30, at 84; Fanar Haddad, *Shia-Centric State Building and Sunni Rejection in Post-2003 Iraq*, CARNEGIE ENDOWMENT INT’L PEACE (Jan. 7, 2016), <https://carnegieendowment.org/2016/01/07/shia-centric-state-building-and-sunni-rejection-in-post-2003-iraq-pub-62408> [<https://perma.cc/KC2V-DC4K>].

94 See John McGarry & Brendan O’Leary, *Iraq’s Constitution of 2005: Liberal Consociation as Political Prescription*, 5 INT’L J. CONST. L. 670, 674, 681 (2007).

95 See Article 7, Section 1, Dustūr Jumh. ūriyat al-‘Irāq [The Constitution of the Republic of Iraq] of 2005 (“Any entity or program that adopts, incites, facilitates, glorifies, promotes, or justifies racism or terrorism or accusations of being an infidel (takfir) or ethnic cleansing, especially the Saddamist Ba’ath in Iraq and its symbols, under any name

replicate the historically successful denazification of Germany after World War II,⁹⁶ the new regime removed vast portions of the personnel from public posts to facilitate the beginning of a new constitutional and political course.⁹⁷ This excluded from the army those who had been affiliated with Saddam Hussein.⁹⁸ As the army was mainly led by Sunnis who had been loyal to Saddam, it was largely disbanded. Many of those who were left without a job and socially marginalized but had military training found an alternative in the rising ISIS's ranks.⁹⁹ ISIS was able to pay high salaries to its troops and gave them the chance to fight the Shia who had ruined their lives.¹⁰⁰ The democratic experiment in Iraq became a sectarian chaos, within which the smallest minorities, such as Christians, were the most exposed to violence, as they did not have the political leverage the Shia now enjoyed, a military apparatus that was comparable to the Kurds, or ISIS's protection.¹⁰¹

V. THE INDIVIDUAL IN THE MIDDLE EAST

Given the bad shape in which Afghanistan and Iraq were at the time of the international interventions, it is no surprise that replacing the existing regimes with rule-of-law-based ones seemed to make a lot of sense.

As seen above, both the Afghan and the Iraqi Constitutions cite the rule of law in their preambles; they strongly emphasize the equality among citizens, their respect for human beings irrespective of their

whatsoever, shall be prohibited. Such entities may not be part of political pluralism in Iraq.”).

96 See Daniel Johnson, *What Iraq Can Learn from De-Nazification*, WALL ST. J. (Apr. 22, 2003), <https://www.wsj.com/articles/SB105095981621579000> [https://perma.cc/J2AT-BUPU].

97 See James P. Pfiffner, *US Blunders in Iraq: De-Baathification and Disbanding the Army*, 25 INTEL. & NAT'L SEC. 76, 76 (2010). “Lustration policies not only reform the institutions but also punish the personnel involved in past violations by preventing them from the benefits of one of their constitutional rights, i.e., the right to hold public offices.” Eman M. Rashwan, *The Price of Transitional Justice: A Cost-Benefit Analysis of its Mechanisms in Post-Revolution Phase*, 6 U. BOLOGNA L. REV. 95, 126 (2021).

98 See Mark Thompson, *How Disbanding the Iraqi Army Fueled ISIS*, TIME (May 28, 2015), <https://time.com/3900753/isis-iraq-syria-army-united-states-military> [https://perma.cc/S8HS-66T8].

99 See *id.*; WALTER A. MCDUGALL, THE TRAGEDY OF U.S. FOREIGN POLICY: HOW AMERICA'S CIVIL RELIGION BETRAYED THE NATIONAL INTEREST 14 (2016).

100 See Thompson, *supra* note 98; Jessica Hartogs, *ISIS Cuts Fighters' Salaries Due to 'Exceptional Circumstances'*, CNBC (Jan. 20, 2016), <https://www.cnbc.com/2016/01/20/isis-cuts-fighters-salaries-due-to-exceptional-circumstances.html> [https://perma.cc/FJW4-96ZB] (“ISIS soldiers earn[ed] between \$400 and \$1,200 a month, plus a \$50 stipend for their wives and \$25 for each child . . .”).

101 See OTMAR OEHRING, CHRISTIANS AND YAZIDIS IN IRAQ: CURRENT SITUATION AND PROSPECTS 13–14 (2017).

gender, ethnic, or religious identity, and grant everyone access to justice.¹⁰² Their basic structure thus echoes the rule-of-law mentality that is typical of liberal systems, which are characterized by a “significant emphasis on the issue of liberty and individualism,”¹⁰³ and wherein political institutions pursue common interests and courts provide fora within which to hear complaints and redress injustices. But such constitutional regimes may not fit Middle Eastern societies. Despite repeated efforts to westernize the Middle East,¹⁰⁴ such societies still seem to function according to significantly different rules. The difference does not derive solely from the Islamic legal and political tradition, but it is certainly indebted to this religion’s mentality.

In Middle Eastern societies, the individual is immersed in ethnic and religious structures that discharge political functions.¹⁰⁵ This applies to the Islamic community—the *ummah*—as well as to the rest of religious and ethnic groups, which the Koran refers to with this same word.¹⁰⁶ At least since the times of the great medieval Islamic thinker Ibn Khaldun,¹⁰⁷ the dominant religious community in the Middle East has therefore constantly seen itself and other religions and ethnicities as the groups within which individuals and families find their primary political identity and affiliation, enjoy their rights, and are expected to discharge their obligations.¹⁰⁸

The political and legal significance of the individual and of equality in the stereotypical rule-of-law scenario diverges significantly from the Middle Eastern situation. In the latter case, individuals are first and foremost members of their ethnic or religious group. It is primarily through their group membership that they are recognized as members of the society at large.¹⁰⁹ The national society, in fact, sits on a layer of different groups that mutually recognize each other and mutually negotiate the polity’s goals.¹¹⁰ The role of judicial redress in the Middle East also differs considerably from the rule-of-law ideal. By pitting individuals and groups against each other, judicial disputes can endanger the political equilibrium that religious and ethnic

102 See AFG. CONST. 2004, pmbl.; Preamble., *Dustūr Jumh. ūriyat al-‘Irāq* of 2005.

103 Hossein Esmacili, *The Nature and Development of Law in Islam and the Rule of Law Challenge in the Middle East and the Muslim World*, 26 CONN. J. INT’L L. 329, 338–39 (2011).

104 See NATHAN J. BROWN, *THE RULE OF LAW IN THE ARAB WORLD* 29–30 (1997).

105 See TYAN, *supra* note 18, at 111.

106 See *id.* at 107.

107 See Mohammed Talbi, *Ibn Khaldun et le sens de l’Histoire*, 26 STUDIA ISLAMICA 73, 74, 89 (1967).

108 See SAYYED MOHAMMAD KHATAMI, *LA RELIGION ET LA PENSÉE PRISES AU PIÈGE DE L’AUTOCRATIE: VOYAGE AU CŒUR DE LA PENSÉE POLITIQUE DES MUSULMANS PENDANT L’ESSOR ET AU DÉCLIN DE LA CIVILISATION ISLAMIQUE* 303–04 (2005).

109 See PIN, *supra* note 70, at 145.

110 See *id.* at 145–46.

communities usually manage to preserve through negotiations and mutual concessions.¹¹¹ In the Middle East, individual judicial claims may be perceived as eroding the sense of membership that connects the members of a certain group or the social glue among groups.

VI. THE PARADOXICAL RESULT OF ENFORCING THE RULE OF LAW IN FRACTURED SOCIETIES

It was Arend Lijphart's 1960s pioneering studies on "consociations" that first put the existence and the functioning of political societies centered around identity groups that make reciprocal concessions and negotiate the national agenda under the spotlight.¹¹² Such political structures are not mere relics of the past or exotic systems of government that are unfamiliar to the West, however.

In the Middle East, in the first half of the twentieth century the Lebanese state adopted a written constitution under French auspices,¹¹³ thanks to political negotiations that culminated in the apportionment of parliamentary seats and other key political offices along religious lines.¹¹⁴ Consociations surfaced also in the late twentieth century's Europe. In the 1990s, the conflicts in Bosnia-Herzegovina¹¹⁵ and in Northern Ireland¹¹⁶ ceased after consociational compacts gave the parties involved reciprocal veto powers and required cross-group political majorities for bills of major political concern and impact. The United States was particularly involved in the Bosnia peace process that culminated in the Dayton Agreement (1995).¹¹⁷ The Agreement included the very Constitution of Bosnia, which gave birth to a power-sharing system among Bosnian citizens according to their religious and ethnic affiliation: Muslim Bosniaks, Catholic Croatians, and Orthodox Serbians.¹¹⁸

Consociations cover a spectrum of significantly different constitutional solutions. John McGarry and Brendan O'Leary, among others, have identified the two main alternatives in the "liberal consociation" and the "corporate consociation," the main difference

111 See *id.*

112 See Arend Lijphart, *Consociational Democracy*, 21 WORLD POL. 207, 216–22 (1969).

113 EDMOND RABBATH, *LA CONSTITUTION LIBANAISE: ORIGINES, TEXTES ET COMMENTAIRES* 50 (1982).

114 See SAMUEL ISSACHAROFF, *FRAGILE DEMOCRACIES* 7 (2015).

115 See Andrea Pin, *Il Costituzionalismo Consociativo. Libertà, Sfera Pubblica e Partiti*, 2020 PERCORSI COSTITUZIONALI 45, 49 (2020).

116 See *id.* at 49–50.

117 See Ronald C. Slye, Comment, *The Dayton Peace Agreement: Constitutionalism and Ethnicity*, 21 YALE J. INT'L L. 459, 472 (1996).

118 See The General Framework Agreement for Peace in Bosnia and Herzegovina arts. IV–V, Dec. 14, 1995, 35 I.L.M. 75.

between them being the degree of social mobility that the two models accord to their citizens.¹¹⁹ The two authors praised the Iraqi Constitution's option of a liberal form of consociation.¹²⁰ That text, they reasoned, did not adopt the corporate model,¹²¹ which operates "on the assumption that group identities are fixed and that groups are both internally homogeneous and externally bounded."¹²² On the contrary, Iraqis had a constitution that allowed the individual to decide whose group he or she wanted to become a member of.¹²³

McGarry and O'Leary might have been too optimistic. The Iraqi Constitution mirrored the basics of rule-of-law constitutional states, with elections and political institutions that do not reflect specific ethnic or religious groups but claim to represent the wholeness of the body politic.¹²⁴ As a matter of fact, however, the distribution of key institutional roles in Iraq after Saddam Hussein's regime has consistently reflected the religious demographics: the head of the executive power—who enjoys the most influential role—has been Shi'a; the head of state—the second most prominent political figure—has been Kurdish; the Sunnis have been given the leader of the Parliament, the available figure with the least effective political leverage.¹²⁵

Even ISIS, despite its claim of representing the universal *ummah* of believers and of ruling according to Islamic law, was more aware of the reality on the ground than the Iraqi Constitution. ISIS came to terms with the Iraqi reality of tribal and ethnic affiliations within the Sunni camp.¹²⁶ It secured some success in the region by negotiating with tribal groups that garnered it popular support but through which it implicitly acknowledged the political significance of tribal bonds.¹²⁷ ISIS was therefore more realistic than the rule-of-law project that the West launched in Iraq, which had the paradoxical effect of pushing the land of Abraham into a theatre of sectarian clashes.

119 See McGarry & O'Leary, *supra* note 94, at 675.

120 See *id.* at 678.

121 See *id.*

122 *Id.* at 675.

123 See *id.* at 675, 678.

124 See Article. 39, Section 2, Dustūr Jumh. ūriyat al-'Irāq of 2005 ("It is not permissible to force any person to join any party, society, or political entity, or force him to continue his membership in it.").

125 See Pierre-Jean Luizard, *Iraq: State Against Society*, OASIS (Jan. 24, 2022), <https://www.oasiscenter.eu/en/iraq-state-against-society> [https://perma.cc/73GC-N7GQ].

126 See Christoph Günther & Tom Kaden, *Beyond Mere Terrorism: The Islamic State's Authority as a Social Movement and as a Quasi-State*, 34 SEC. & PEACE 134, 134 (2016).

127 See *id.*

Similar mistakes were apparent within the Afghan scene. Its society is characterized by social, ethnic, and religious affiliations of various intensity and the agenda is constantly negotiated by such groups. As the rise of the Haqqani network within Taliban ranks shows,¹²⁸ the Taliban—who were ultimately able to seize control of Afghanistan again while the international forces were retreating—are not a monolithic group. They are also a fragmented faction, which harbors a variety of pivotal figures who make and unmake allegiances depending on the circumstances. The late 2021’s clashes between the Taliban and ISIS find an explanation in the deeply divided Afghan society and in the only partial allegiance that the Taliban were able to secure among Afghans since late August 2021.

CONCLUSION

This Essay did not presume to find a cure for the plague of religious persecution that has been affecting the Middle East practically without interruption at least for decades. It aimed to issue a warning, however: some aspects of the constitutional culture of the Middle East cannot and should not be treated as merely vicious practices that need and should be redressed by enforcing full-fledged rule-of-law principles and rules. Some practices reflect a deeply seated political culture and should not be disposed of.

Expecting that rule-of-law-centered constitutions replace dictatorships with decent democracies that are committed to the judicial protection of rights and to equality among citizens often underestimates important facets of the Middle Eastern constitutional culture. Sectarian apportionments of political institutions, the ethnic distribution of seats, or the customs of negotiating mutual concessions among factions are important practices of peoples who find themselves more attached to their religious, tribal, or ethnic authorities rather than to their national authorities. Replacing autocracies with rule-of-law constitutional principles and institutions may not heal religious wounds and end persecutions in territories that endured autocracy or religious totalitarianism. Good intentions notwithstanding, such initiatives may worsen or trigger social clashes that traditional Middle Eastern political structures may be better equipped to keep under check.

Borrowing from Christopher McCrudden and Brendan O’Leary, it seems necessary to reevaluate the importance of consociations. Such political solutions are often misunderstood and even criticized in the

128 Abdul Sayed & Colin P. Clarke, *With Haqqanis at the Helm, the Taliban Will Grow Even More Extreme*, FOREIGN POL’Y (Nov. 4, 2021), <https://foreignpolicy.com/2021/11/04/haqqani-network-taliban-relationship-afghanistan-pakistan-terrorism/> [https://perma.cc/5Z99-5B5N].

name of values like the rule of law, equality, individualism, or human rights such as religious freedom. The trajectory of Afghanistan and Iraq should warn against “a particular form of universalist, or ‘difference-blind’, international human rights judicial activism. . . . [T]his ‘difference-blind’ activism is generally well intentioned, but it has the potential to jeopardize peace and human security. It may worsen or delay the better protection of human rights.”¹²⁹

129 CHRISTOPHER MCCRUDDEN & BRENDAN O’LEARY, *COURTS AND CONSOCIATIONS*, at xvii (2013).